Supreme Court, U. S.
FILED
JAN 28 1980
MICHAEL RODAK, JR., CLERK

No. 79-673

In the Supreme Court of the United States

OCTOBER TERM, 1979

PROVIDENCE JOURNAL COMPANY, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-673

PROVIDENCE JOURNAL COMPANY, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner contends that the court of appeals erred in concluding that certain records of the Federal Bureau of Investigation compiled as a result of an illegal electronic surveillance are exempt from disclosure under Exemption 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(7)(C).

1. Between March 1962 and July 1965, the FBI recorded conversations inside the business office of respondent Raymond L.S. Patriarca by means of an electronic listening device secretly implanted without a warrant (Pet. App. 17-18). Before erasing those tape recordings, FBI agents compiled some 2,000 documents comprising more than 7,000 pages (*id.* at 18). It is these documents that are the subject of this litigation.

The FBI documents reflect the conversations that took place in respondent Patriarca's business office over a three-year period. In a few instances, portions of those conversations, and some complete conversations, are set forth verbatim (A. 113).[1] For the most part, however, the conversations are summarized or restated in the words of the FBI agent who prepared the documents (A. 113-114). The documents largely contain "raw, uncorroborated information" (A. 114).

In November 1976, petitioner submitted a request under the FOIA seeking disclosure of these FBI records (Pet. App. 18). The Director of the FBI denied petitioner's request, relying on Exemptions 7(A), (C), and (D) (*ibid.*). On petitioner's administrative appeal, the Department of Justice in October 1977 affirmed the FBI's decision to withhold the records on the basis of Exemption 7(C) (*ibid.*; *id.* at 121-122).[2]

In August 1977 petitioner ~~then~~ brought this lawsuit in the United States District Court for the District of Rhode Island against the FBI and the Department of Justice, and respondent Patriarca subsequently intervened as a defendant (Pet. App. 18, 66). On cross-motions for summary judgment, the district court ruled that, with the limited exception of certain matters relating to respondent Patriarca's private family life and the identities of FBI agents and informants, the requested FBI records must be released (*id.* at 19, 43-51).[3]

[1]"A." refers to the Consolidated Appendix submitted in the court of appeals.

[2]Exemption 7(C) excludes from disclosure "matters that are investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would constitute an unwarranted invasion of personal privacy." 5 U.S.C. 555(b)(7)(C). See also *Department of Air Force* v. *Rose*, 425 U.S. 352, 378-379 n.16 (1976).

[3]The First Circuit granted a stay of the district court's order pending appeal (Pet. App. 19).

The court of appeals reversed the judgment of the district court, holding "that the FBI may properly turn down this FOIA request under Exemption 7(C)" (Pet. App. 25). In reaching this conclusion, the court recognized that the statute calls for a "balancing process to determine whether, under Exemption 7(C), production of records would constitute an 'unwarranted invasion of personal privacy' " (*id.* at 20). In undertaking this "balancing process," the court turned to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, which it found to be "a deliberate policy statement of Congress" that "sheds light on the meaning of the phrase ['unwarranted invasion of personal privacy']" in the context of records generated by electronic surveillance and, therefore, "should not be ignored" (Pet. App. 22).

The court of appeals reasoned that "Congress, by passing Title III, has already balanced the same kind of factors that must be balanced under Exemption 7(C)" in this case and has "decided that the risk to privacy created by illegal electronic surveillance is too great to permit any disclosure of the fruits of such surveillance" (Pet. App. 23). Finding that the surveillance here "was exactly the kind of 'insidious invasion of privacy' that Congress 'singled out for special scrutiny and safeguards' " in Title III, the court concluded that "[i]ntrusions before 1968 were no less insidious than intrusions after 1968, and to the extent reasonable, the victims should be protected from disclosure after 1968 in accordance with Congress' stated policy (*ibid.*). Thus, "given the circumstances of this case," the court of appeals adopted the balance that had been struck by Congress under Title III and determined that disclosure

of the requested FBI records—the fruits of an unconstitutional electronic surveillance—"would * * * constitute an unwarranted invasion of personal privacy" within the meaning of Exemption 7(C) (*ibid.*).[4]

2. The decision of the court of appeals is correct and does not warrant review by this Court. The First Circuit properly adhered to the balance of competing interests that had been reached by Congress in enacting Title III with regard to records generated by electronic surveillance. The court, quoting from *Gelbard* v. *United States*, 408 U.S. 41, 48 (1972) (footnote omitted), accurately observed that "the protection of privacy was an overriding congressional concern" under Title III (Pet. App. 20). And the court correctly recognized, as stated in *United States* v. *United States District Court*, 407 U.S. 297, 302 (1972), that Title III "represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression" (Pet. App. 20). See also *United States* v. *Cianfrani*, 573 F. 2d 835, 856 (3d Cir. 1978).[5]

---

[4]The government has long acknowledged that the electronic surveillance of respondent Patriarca was conducted in a manner violative of the Fourth Amendment. See *United States* v. *Taglianetti*, 274 F. Supp. 220 (D. R.I. 1967), aff'd, 398 F. 2d 558, 569-572 (1st Cir. 1968), aff'd per curiam, 394 U.S. 316 (1969); see also Pet. App. 122. As the district court in the present case expressly observed, "[a]ll parties agree that the electronic surveillance in issue violated the fourth amendment rights of Mr. Patriarca and others. * * * The surveillance violated the warrant requirement; in addition, it appears that the breadth of the search in time and extent were per se unreasonable" (Pet App. 71; footnote omitted). The court of appeals similarly remarked that this "surveillance violated the Fourth Amendment" (*id.* at 18; see also *id.* at 23).

[5]As the Third Circuit observed in *Cianfrani* (573 F. 2d at 856):

> Congress's overriding interest in protecting privacy to the maximum extent possible is evident in Title III. The legislative history of the statute emphasizes the concern of its drafters that the Act preserve as much as could be preserved of the privacy of communications, consistent with the legitimate law enforcement needs that the statute also sought to effectuate. Similarly, the complex and overlapping provisions are strong evidence that Congress intended to regulate strictly disclosure of intercepted communications, limiting the public revelation of even interceptions obtained in accordance with the Act to certain narrowly defined circumstances.
>
> Moreover, protection of the privacy of communications is vital to our society. We depend upon the free interchange of ideas and information. And we are dedicated to the proposition that each individual should be free from unwarranted intrusion into his private affairs. Both these interests are threatened by modern techniques of electronic surveillance, however, since it is now possible to record surreptitiously the most intimate conversations and to preserve them for later disclosure. Only by governing strictly both authorization and disclosure of intercepted communications did Congress believe that such weighty interests could be protected adequately.

Given the clear congressional policy in Title III against the disclosure of the kind of information contained in the records sought by petitioner in this case,[6] the court of appeals' conclusion that disclosure of such information "would constitute an unwarranted invasion of personal privacy" under Exemption 7(C) is fully justified. As the court stated, "[t]here is no reason for us to think that what Congress in 1968 considered so unwarranted

[6]Petitioner acknowledges (Pet. 12) that Title III was enacted largely to address Fourth Amendment concerns. As the Court noted in *United States* v. *United States District Court*, *supra*, 407 U.S. at 302, "[m]uch of Title III was drawn to meet the constitutional requirements for electronic surveillance enunciated by this Court in *Berger* v. *New York*, 388 U.S. 41 (1967), and *Katz* v. *United States*, 389 U.S. 347 (1967)." It would be odd indeed if invasions of privacy substantial enough to violate the Fourth Amendment were not of sufficient magnitude to permit non-disclosure under Exemption 7(C). This is particularly true in a case involving the illegal interception of oral or wire communications.

an invasion of privacy that its fruits should be kept secret would not still be so considered in 1974 when Congress created Exemption 7(C)" (Pet. App. 22; footnote omitted).

Furthermore, there is no conflict among the circuits on the question presented in this case, and the court of appeals remarked that its "holding is not broad" (Pet. App. 24). The court limited its decision to FOIA requests for "the 'contents' of 'wire' or 'oral communications' 'intercepted' before June 19, 1968, by means of an 'electronic, mechanical, or other device' * * * in violation of the Constitution or federal law" (*id.* at 25; footnote omitted). Thus, the decision is confined to the "unique * * * circumstances of this case" involving "this narrow class of information" (*id.* at 24) and does not affect the general application of Exemption 7(C).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

JANUARY 1980

DOJ-1980-01